IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.151 OF 2005

Mr. S.K. Gandhi
and Ors. ...Applicants.

V/s

M/s. Bharwani Brothers
& Co. and Anr. ...Respondents.

Mr. Prakash Naik for the applicants.
Mr. A.S. Shitole, APP for the State.

CORAM: V.M.KANADE,J.
DATE: 11th April, 2005

P.C.

1. Heard the learned Counsel for the applicants.

2. Leave to amend.

3. Applicants are challenging the issuance of process by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai in a complaint filed by respondent No.1 under section 138 of the Negotiable Instruments Act.

4. The learned Counsel appearing on behalf of the applicants submitted that there are no averments in the complaint to indicate the exact role played by the applicants and that the averments are vague and, therefore, provisions of section 141 of the Negotiable

Instruments Act are not attracted. The second submission made by the learned Counsel appearing on behalf of the applicants is that in the statutory notice which was issued by the complainant, wrong cheque number has been mentioned. It is, therefore, submitted that the statutory notice itself being defective, no complaint could have been filed against the present applicants. The learned Counsel appearing on behalf of the applicants has relied upon the judgment of the learned Single Judge of this Court dated 23/12/2004 in the case of Vijay Mallya V/s. State of Maharashtra and Ors in Criminal Application No.4827 of 2004 alongwith Criminal Application Nos. 4828, 4829 and 4830 of 2004 (Coram: A.M. Khanwilkar, J.) in support of his submissions.

5. It is not possible to accept the submissions made by the learned Counsel appearing for the applicants. There cannot be any strait jacket formula for the purpose of deciding whether averments in the complaint are adequate or inadequate and the complaint will have to be read as a whole. If there are no averments at all made in the complaint then, possibly, the submissions made by the learned Counsel can be accepted. However, in a case where averments are made, merely because material particulars are not

given that by itself cannot be the ground for quashing the complaint qua such applicants. In the present case, in para 2 of the complaint, following averments have been made.

> "2. I say that the accused No.1 is a Public Limited Company. The accused No.3 is the Chairman & Managing Director of accused No.1 and the accused No. 3 to 13 are the Directors of No.1 above and are all responsible alongwith other Directors, whose names I have not been able to obtain, for the Management of the day to day affairs of accused No.1."

Further, in para 3, particulars regarding transactions have been mentioned. Further, it is stated that post-dated cheque was issued in favour of the complainant - firm. Further particulars have been mentioned in paras 7 and 8. Merely because in the averments made in the complaint the term "accused" has been used that cannot be construed to mean that the specific names of the applicants being not mentioned the averments are not adequate. So far as the judgment in the case of Vijay Mallya (supra) is concerned, the learned Single Judge of this Court, in my view, has come to the conclusion on the facts and

circumstances of the said case. The High Court while exercising its inherent powers under section 482 of the Criminal Procedure Code cannot embark on an inquiry as to whether the averments are vague and the extent to which they are vague.

6. The second submission made by the learned Counsel for the applicants is that in the statutory notice which was issued, the number of cheque entered is 974347 dated 20/11/1995 instead of 975457 dated 20/11/1995. In my view, merely because cheque number is wrongly mentioned in the statutory notice that would not be an error which would vitiate the trial. The requirement under section 138 is of sending statutory notice and mentioning the date and the amount of dishonour. Therefore, merely because number of cheque is wrongly mentioned that would not vitiate the trial. The Andhra Pradesh High Court has taken a similar view in the case of Kavuri Suwarna Bala Sundaram Vs. Karmati Poorna Chandra Rao & Anr reported in 2004 ALL MR (Cri) Journal 37. Thus, there is no reason to interfere with the order passed by the learned Magistrate. All questions, however, raised in this application are kept open. Applicant is entitled to raise these questions before the Trial Court. Trial Court shall decide the case on merits and in

accordance with law. If an application for exemption is made by the applicants, the said application may be considered favourably and the Magistrate should not insist on the accused remaining present during the course of the trial unless it is absolutely necessary, for example for recording the statement under section 313, if the Magistrate so deems fit and proper. Even the plea of the applicants may be recorded through their advocate.

7. With the above directions, Criminal Application is dismissed.

V.M. KANADE, J.